IMPOSSIBILITY OF PERFORMANCE OF CONTRACTS DUE TO WAR-TIME REGULATIONS

I

Introduction

THE far-reaching control which during the period between the declaration of war and the signing of the armistice with Germany it was found necessary for the government to exercise over the production, consumption, and movement of commodities brought about an unprecedented disturbance of the ordinary contract relations between producers and consumers of almost every conceivable article of commerce. Whether a particular commodity was found to be necessary for war purposes or was considered nonessential, the need of the government for the one and the need of preventing labor and capital from being absorbed in the production or transportation of the other led to a drastic interference with the contracts of private citizens relating to each. As a general rule the parties to such contracts appear to have treated losses thus caused them as part of the fortunes of war, and hence litigation between buyer and seller growing out of this situation has up to this time, — so far at least as the reported cases show, — been of extremely rare occurrence. It seems not improbable, however, that this reluctance to litigate may be diminished now that the period of active warfare has come to an end; and, in any event, the problems presented by the war-time interference with contracts, whether or not they are to lead to litigation and hence to judicial decisions, are of a sufficiently novel character to be of considerable interest to the student of the law of contracts.

Prior to the war, governmental interference with contracts was confined almost entirely to the enactment of laws, or of regulations and ordinances having the force of law, by virtue of which the making of certain subsequent contracts or the performance of certain preëxisting ones became illegal. That governmental action might render performance of a contract impossible rather than

unlawful was indeed recognized both by courts and by text-writers,[1] but the cases in which governmental action had had this effect were comparatively rare.

A somewhat different situation existed during the period of active warfare. Since the war was to an unprecedented extent an industrial as well as a military one, the control exercised over the industries of the country in the interest of war-making was of a sort for which no precedent can be found in the history of previous conflicts in which this country has been engaged. To some extent this was accomplished through the medium of regulations issued under some federal statute authorizing the executive to prohibit certain forms of business activity, such as hoarding of foods, exporting or importing without a license, etc., deemed to be detrimental to effective war-making. Such statutes and regulations may present important legal problems with regard to the scope of the war power, the right to delegate legislative power and the like, but they do not involve the question with which this article is concerned, namely, that of governmental prevention as contrasted with governmental prohibition.

Prevention, rather than prohibition, was however, in the main, the order of the day. Thus while it was illegal to hoard food or to trade with the enemy, it was, although not illegal, in general impossible to buy or sell toluol or wool, substantially the entire supply of which was taken over by the government, or to fill orders for articles deemed nonessential where these articles could not be produced without large quantities of raw materials of a kind urgently needed for war purposes. It is with such cases of impossibility that we have to deal.

Impossibility of performance is, in general, recognized by our law as an excuse for failure to perform a contract in a limited class of cases only, impossibility in law being by no means coextensive with impossibility in fact.[2] How far, if at all, these limits should be extended by judicial decision where the impossibility is due to the act of the government, of which the judiciary is itself a part,

[1] See WILLISTON ON SALES, § 661, and cases cited.

[2] Impossibility of performance has been recognized as a defense where due (1) to a change in the law; (2) to death or illness in contracts requiring personal service; (3) to a destruction or change in the character of the goods to which the contract relates; (4) to a failure of the contemplated means of performance, the limits of this latter doctrine being very ill-defined. See WILLISTON ON SALES, § 661.

is a question on which there is naturally but little authority in view of the fact that governmental interference has, as has been stated, been normally of such a character as to present problems with regard to illegality rather than impossibility. It would appear, therefore, that courts are free to regard the problems arising out of governmental interference in war time as to a large degree *sui generis*, and that they need not adhere strictly in cases of this sort to the precedents which have been established in the law of impossibility of performance in general, but are at liberty to reach the results most consistent with justice and public policy, as long as these results can be attained with due regard to the more fundamental principles of the law of contracts.

II

Removal of Subject Matter of Contract by Requisitioning

The ordinary rules with regard to impossibility will, however, furnish an adequate solution to a number of the problems presented by war-time governmental interference with contracts. Thus where a contract for the sale of specific goods has been rendered impossible of performance by the requisitioning of those goods by the government, there would appear to be no difficulty in treating the requisitioning of these goods as equivalent to their destruction and hence as excusing failure to deliver them according to well-settled contract principles. A recent English case [3] which takes this view of the matter would, no doubt, be followed in this country.[4]

More difficult questions may, however, arise where the government has not taken over the title to property but has merely taken the right to its temporary use. A number of cases of this sort have arisen in England involving the effect on a charter party of the requisitioning of the use of a chartered ship by the government. Where the ship has been chartered for the purpose of making a particular voyage it appears to be the view of the English courts that a requisition which makes the voyage impossible puts an end

[3] *In re* Shipton, Anderson & Co., [1915] 3 K. B. 676.

[4] A similar problem might arise in eminent domain cases in peace times, but eminent domain generally relates to real estate in regard to which the question is materially affected by the doctrine of equitable title.

to the charter party,[5] thus giving to the act of the government the same effect which would be given to an act of God which should bring about a similar "frustration of the adventure," to use the common English term.

A ship may, however, be chartered for a period of months or years rather than for a particular voyage. In such a case the use of the ship by the government would not necessarily be inconsistent with the object of the charter party any more than a temporary injury to the ship from perils of the sea would be. A majority of the House of Lords has accordingly held that the requisitioning of a ship which was under a charter having several years to run did not terminate the charter.[6] In view of the length of the war and the fact that requisitioned ships were seldom returned to their owners during the continuance of hostilities, the result reached in this case has not escaped criticism,[7] and in at least one case involving a time charter the English court of appeal has found it possible to distinguish rather than to follow it.[8]

III

Compulsory Government Orders for Production

Instead of taking possession of the property which is the subject matter of the contract, the government might order the owner to make some use of the property, or of some other property necessary to the performance of the contract, which use would render such performance impossible. Thus Congress conferred upon the President the power to place with a manufacturer or other producer compulsory orders for war material, and required that such orders be given precedence over all other business.[9]

If the government placed such an order with a manufacturer for a quantity of goods equal to the entire output of his factory, the effect of such order would be to render it impossible for him to perform any private contract he might have made which pro-

[5] See cases, cited *infra*, in connection with time charters.

[6] F. A. Tamplin S. S. Co. *v.* Anglo-Mexican Co., [1916] 2 A. C. 119.

[7] See 34 Law Quart. Rev. 126.

[8] Countess of Warwick S. S. Co. *v.* Le Nickel Société Anonyme, [1918] 1 K. B. 372.

[9] See National Defense Act of June 3, 1916, 39 Stat. at L., c. 134, §§ 120, 166. Naval Appropriations Act of March 4, 1917, 39 Stat. at L., c. 180, 1168; General Deficiency Act of June 15, 1917 [Public — No. 23 — 65th Congress (H. R. 3971)]; Emergency Shipping Fund provisions.

vided either expressly or by implication for the production of goods in that factory, except by denying to the government order the precedence to which it was entitled by statute. It may be argued, therefore, that the case is one in which performance had become illegal, but the legal objection is not due to any impropriety in the contract itself, but solely to the fact that, under the existing circumstances, performance could not be given consistently with the fulfillment of the legal duty of giving such preference to the government order as was necessary in order to carry it out on time. Should the contractor have found some means of so increasing the productivity of his plant as to perform both his contract and the government order the law would have had no objection to his doing so. It seems more accurate, therefore, to treat the case as one in which the government order, because of the legal consequences attaching to it, made performance impossible rather than as a case of illegality. The case is thus substantially similar to the requisitioning, or, apart from the temporary character of the impossibility, to the destruction of the factory by an act of God, and has properly been treated as at least a suspensive defense for failure to perform.[10]

In that case the court assumed that the defense was merely suspensive and that the defendant would have been compelled to perform after completing the government order, had the contract not been repudiated by the plaintiff prior to that time. It is believed, however, that performance is not merely suspended but entirely excused provided the delay is a material one, since to require performance after a long delay would be "not to maintain the original contract but to substitute a new contract for it."[11]

Frequently, however, a government order did not require even for a time the use of the entire machinery of a plant. Where such was the case it would frequently have been possible for the manufacturer to perform one or more of his private contracts without denying to the government order its statutory priority, but not to perform all such private contracts. It is believed that the

[10] Moore & Tierney, Inc. *v.* Roxford Knitting Co., 250 Fed. 278 (1918).

[11] Metropolitan Water Board *v.* Dick, Kerr & Co., [1918] A. C. 119. This case decides that a regulation of the Ministry of Munitions which made work on a reservoir impossible for a considerable length of time did not suspend the contract for the work but terminated it. See, also, Andrew Millar & Co. *v.* Taylor & Co., [1916] 1 K. B. 402, dealing with the effect of a temporary embargo.

weight of authority in closely analogous cases supports the view that the proper course for a manufacturer to have pursued under such circumstances would have been to have offered to each customer with whom he had a contract his *pro rata* share of what could have been produced over and above the government order,[12] assuming the case to be one in which, for the reason just stated above, the fulfillment of the contracts after the completion of the government order would not have been required.

IV

Interference by the Government with Materials Needed in Production — Coal Regulations

Without requisitioning either the subject matter of the contract or the seller's plant or tying up that plant by a compulsory order, the government might, however, make production no less impossible by interfering with the supply of some material essential to production. Thus the President was given the right to regulate the distribution of coal and coke,[13] and the Fuel Administration, to which this power was delegated, in the winter of 1918 issued the well-known "heatless days" order by which no coal could be burned on certain days except by those engaged in certain essential industries; and subsequently, through coöperation with other governmental agencies, a priority list was compiled, the effect of which was to make it impossible, in cases of shortage of coal, for industries classed as nonessential to obtain a supply adequate for normal production. Such regulations[14] were from a

[12] Such is the holding of a majority of the cases dealing with a similar question arising in connection with "strike clauses" in contracts. See McKeefrey *v.* Connellsville Coke & Iron Co., 56 Fed. 212 (1893); Luhrig Coal Co. *v.* Jones & Adams Co., 141 Fed. 617 (1905); Oakman *v.* Boyce, 100 Mass. 477 (1868); Jessup & Moore Paper Co. *v.* Piper, 133 Fed. 108 (1902); Con. Coal Co. *v.* Mexico Co., 66 Mo. App. 296 (1896). Some of these decisions are rested in part on an alleged custom of the coal business. A similar view has been taken by the House of Lords with regard to the effect of a clause relating to impossibility due to war. Tennants, Ltd. *v.* C. A. Wilson & Co., Ltd., 1917 A. C. 495. The following are *contra:* Hunter Finch & Co. *v.* Zenith Furnace Co., 146 Ill. App. 257 (1909) aff'd, 245 Ill. 586 (1910); Coal Co. *v.* Ice Co., 134 N. C. 574 (1904).

[13] See Food Control Act of August 10, 1917, § 25. Public — No. 41 — 65th Congress [H. R. 4961].

[14] Such regulations are used merely for the purpose of illustration, and their validity under the act above cited is assumed.

practical point of view substantially equivalent to the temporary destruction of a factory dependent on coal for the running of its machinery, and yet inability to obtain coal would not in general be regarded as equivalent to the destruction of the factory in the eye of the law, even though such inability might be due to causes wholly beyond the manufacturer's control.

Ordinarily, however, a prudent manufacturer would at least have been able to obtain contracts for the supply of coal to him, and if the coal was not forthcoming would himself have had a remedy on those contracts; and where this was not the case the law, as between two innocent parties, allows the loss to fall upon the one who has agreed to give performance, the case not falling within the somewhat arbitrary classification of cases in which impossibility is recognized as an excuse.

It is submitted, however, that a wholly different situation exists where the failure of the coal supply was due to action of the government directed specifically at preventing the defendant from obtaining coal, or from using his own coal as in the case of the heatless day order. The question in such a case is not simply whether a party should be held liable on a contract which he has been unable to perform because of causes beyond his control, but whether the judicial branch of the government should hold him liable for failure to do an act which the executive branch, acting under legislative authority, had deliberately and designedly rendered impossible of performance. Such a holding would seem the *reductio ad absurdum* of the doctrine of the separation of powers.

No doubt a contractor takes the risk not only of a declaration of war and of the general disturbance of business caused thereby including a shortage of essential materials due to war conditions. Thus, if, owing to the government's war need for coal, the market was so restricted as to bring about a cut-throat competition between consumers, those who failed to obtain coal would probably be unable to plead such failure as a defense for their own breach of contract. Such consequential injury brought about by governmental action is however very different from a direct governmental prohibition, and a defendant should not be held liable for the results which flow necessarily and directly from the latter. At least where the contract was made prior to the enactment of the Food Control Act, performance should be excused on the ground that

the case is one, in the words of an English judge, "where British (American) administrative intervention has so directly operated upon the fulfilment of a contract for a specific work as to transform the contemplated conditions of performance." [15] Whether or not a different result should be reached in case of an unqualified contract made subsequent to the passage of that act will be considered later in connection with the discussion of priority certificates.

V

Non-Binding Regulations Enforceable Indirectly — Priorities

Thus far we have dealt only with requisitions under authority of law and with orders and regulations which it would have been illegal for the contractor or for the persons dealing with him to have disregarded. It is believed, however, that a similar effect should be given, at least in some cases, to orders of another sort where disobedience would not have been a criminal or even a prohibited act, but where the administration had been granted by Congress a power of compulsion amply sufficient as a practical matter to necessitate compliance with the order in question. The recent English case of *Hulton & Co.* v. *Chadwick & Taylor*,[16] is an example of this sort of order. The defendant in that case was granted a license to import pulp on condition that he would agree to use the pulp imported for the purpose of supplying two-thirds of the pre-war requirements of each customer. The plaintiff had a contract for paper which would necessarily be made from imported pulp. The defendant refused to perform on the ground that he was prevented by the government from performing the contract according to its terms, and was under no obligation to perform a wholly different contract. The Court of Appeal accepted this argument, saying that, although his use of the amount of pulp actually imported by him in violation of the agreement on which he had obtained his import license would not have been illegal, such a violation would undoubtedly have caused the gov-

[15] McCardie, J., in Blackburn Bobbin Co. *v.* T. W. Allen & Sons, Ltd., [1918] 1 K. B. 540, 548.

[16] 34 T. L. R. 230 (1918).

ernment to deny him the right to make further imports, "and thus he was practically prevented" from performing his contract.

It does not appear from the case whether or not the defendant could by using the first instalment of pulp imported by him for the purpose of performing the plaintiff's contract have performed that contract, even though subsequent imports would have been shut off by the government, and the language of the opinion is apparently broad enough to cover either alternative. If the refusal of further import licenses in case of noncompliance with the regulation would have made performance of the contract in question impossible, the decision is limited to a holding that impossibility of performance because of administrative prevention includes a case in which no prevention had actually taken place, but the administration had the power and the almost certain intention, if its regulations were disregarded, of taking action which would have prevented performance.

Even if so limited the case lays down a doctrine which, if followed by American courts, may prove to be of considerable importance in this country, since our own administrative regulations were frequently supported by a potential rather than by an actual exercise of statutory authority, such statutory authority being however sufficient if exercised to have rendered performance of the contract in question impossible.

It is by no means clear, however, that American courts will adopt this view of the matter. Such a view was in fact rejected in the only American case which has come to the writer's attention in which the point was raised, this being the case of *Mawhinney* v. *Millbrook Woolen Mills, Inc.*[17] In that case the defendant had delayed performance of a civilian contract because of demands by government officers that preference be given to work which the defendant had undertaken to perform for the Quartermaster Corps of the Army. It was admitted that the government might have placed an order with the defendant under section 120 of the National Defense Act, which order would have been entitled to priority under that act, and would have excused the defendant for his failure to carry out his contract, but the court held that what had been done did not amount to the placing of an order under that act and rejected the argument that the power of the execu-

[17] 172 N. Y. Supp. 461 (1918).

tive to place a compulsory order was sufficient to justify the defendant's action. The language on this point is as follows:

"Nor do I accept the argument that since defendant was presumed to know that the government could commandeer its plant, the various requests for precedence, envisaged with the power to compel acquiescence, showed what would be attained by exercise of the power if denied or obstructed and so were a form of order. Some of the vigor of this argument seems to depart when it is seen how equally available it would be to a party, willing to exploit its possibilities of war profits with intended evasion or downright violation of his civilian contracts." [18]

It is possible to distinguish this case from the Hulton case since it is clear that in the Hulton case the government did not desire to cut off imports entirely but only to a limited extent. Apparently the only means of doing this was to enforce compliance with a nonmandatory regulation through an implied threat of complete prohibition, and hence the failure of the government actually to exercise its legal powers was no indication that the threat was not a genuine one. In the Mawhinney case on the other hand it might be argued that if the government had really needed priority it would have issued a statutory compulsory order. A very slight acquaintance with the actual practice of the government during the war is, however, sufficient to demonstrate that this latter suggestion is not in accord with the practical situation. For reasons which concern the administrator rather than the lawyer, the administration early adopted and rigidly adhered during the war to a policy of obtaining the priority urgently needed for governmental and other essential orders in the large majority of cases by nonmandatory directions based ultimately on the powers of compulsion rather than by the actual exercise of the statutory compulsive powers.

[18] The court also rejected the argument that what was done was valid as an exercise of the war power of the President. This power is vested in him as commander in chief, and, according to the Civil War cases, relates to the conduct of campaigns and the administration of martial law at the seat of war, rather than to the taking of measures not sanctioned by act of Congress for the procurement of military supplies. *Cf.*, *Ex parte* Milligan, 4 Wall. (U. S.) 2 (1866); Mitchell *v.* Harmony, 13 How. (U. S.) 115 (1851). The changed character of modern war may have altered the situation somewhat, but it would still appear to be true that, the power to raise and support armies being vested in Congress by the Constitution it is the function of Congress rather than of the President to provide for the issuing of orders to members of the civilian population to produce war materials, and that presidential orders of this sort must have some statutory basis, direct or indirect, to have any validity.

After a preliminary period of uncertainty the plan was adopted in September, 1917, of determining priorities by means of certificates issued by the Priorities Committee of the War Industries Board under regulations drafted by that committee and approved by the Secretaries of War and of the Navy. These certificates were intended to be obeyed and were obeyed by the vast majority of the producers of the country, and the government possessed ample powers either by compulsory order or otherwise to compel compliance in any case in which compliance should be refused.

No doubt under ordinary conditions it would be the duty of a producer to let nothing stand in the way of the performance of his solemn engagement short of actual compulsion by authority of law, but, under the peculiar conditions existing during the war, a refusal to act as requested by the executive until actually compelled to do so would have merely subjected the person refusing to the imputation of obstructing the government by a failure readily to coöperate with it without in any way benefiting the other party to the contract. It would seem therefore that a court is taking an entirely artificial and unrealistic position in holding that a practice deliberately adopted by the executive and enforceable through the exercise of powers granted by the legislature will not be treated by the judiciary as governmental action which private citizens are justified in obeying. The refusal by the courts so to treat it will result, from the standpoint of defendants, in protecting only the unusually cautious and the unusually recalcitrant, and on the side of plaintiffs, in permitting the recovery by those few consumers only who had so little regard for the necessity of coöperation with the government as to refuse to acquiesce in such coöperation by the persons with whom they had made contracts.

It may be urged however that while this argument may be sound under such circumstances as those presented by the Hulton case, it is inapplicable to the case of a voluntary contract between a producer and the government, since so to apply it would, as Judge Kelby suggests in the Mawhinney case, *supra*, enable producers to take the initiative in obtaining profitable contracts with the government and then to use such contracts as an excuse for disregarding their lucrative orders from private customers.

It must be borne in mind, however, that it is not the mere existence of the government contract but the insistence on the part

of responsible officials of the government that it be given precedence which is relied on as a defense for the nonperformance of private contracts, and this only to the extent to which the giving of such preference made performance of those contracts impossible, the burden being on the defendant to prove that this impossibility existed. It is believed that where such was actually the case the question whether the initiative for the making of the contract came from the individual or the government should be immaterial. A court would scarcely refrain from holding a statutory compulsory order to be a defense because of proof that the defendant had not been unwilling to have the order placed with him; and it is the writer's view that priority certificates were, in so far at least as they were issued on government contracts, administrative substitutes for compulsory orders, substantially indistinguishable in coercive effect, and properly to be held indistinguishable in their legal effect so far as they affect actions for breach of contract.

Priority certificates were not, however, limited to direct or even indirect government orders but included under Class B priorities "orders and work which, while not *primarily* designed for the prosecution of the war, yet are of public interest and essential to the national welfare or otherwise of exceptional importance." [19] Thus, for example, orders for the manufacture of farm implements were given an automatic B–2 rating.[20] Such cases would appear to lie wholly outside the power to place compulsory orders under the war statutes previously referred to. The justification for the exercise of control by the administrative over the field could not, therefore, be based on those statutes. Its justification lay rather in the fact that the government had so far dislocated many important industries by the unprecedented requirements of the war machine that it was essential to see that the surplus was so directed as to provide for essential needs.

Legal means of enforcing priority certificates of this sort were not lacking, however. Thus few industries can exist without a supply of certain basic raw materials such as steel and copper, and control of these was early acquired by the government through agreement with the principal producers. Without questioning the

[19] See Priority Circular, No. 4, issued July 1, 1918.

[20] See above circular.

voluntary character of the coöperation given to the government by these producers, it may be pointed out that the statutory powers of requisitioning, placing compulsory orders, and taking over plants furnished an ultimate legal basis for the control which was thus exercised. While there might in a particular case have been some question as to the power of the government to enforce by compulsory order the priority which a manufacturer was directed to give to an order from a private corporation for threshing machines, there could be little doubt of the government's power to control the country's entire production of steel, of which there was a serious shortage, by placing orders for the entire output of the steel mills or even by taking over the mills themselves. This potential control was amply sufficient to compel the steel mills to allocate steel as directed by the government.

In addition to this control over basic raw materials the government had an even more complete statutory control over coal,[21] transportation,[22] exports,[23] and imports,[24] and a very effective control over labor based in part on the administration of industrial exemptions under the draft laws,[25] and in part in the allocation of labor by the United States Employment Agency.

In times of peace it would no doubt be a violent distortion of legal principles for the various departments of the government to use their powers for the purpose of enforcing the rulings of a separate branch of the government. It must be borne in mind however that the powers granted by Congress in the acts passed to deal with the war emergency were conferred not for some specific purpose distinct from the activities of the government as a whole, but for the purpose of the national security and common defense, and further that these powers, although exercised by a number of

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[21] See Food Control Act of August 10, 1917, § 25. [Public — No. 41 — 65th Congress (H. R. 4961)],

[22] See Army Appropriation Act of August 29, 1916, 39 STAT. AT L., c. 418, p. 619; Amendment to Interstate Commerce Act of August 10, 1917, [Public — No. 39 — 65th Congress (S. 2356)]. Railroad Control Act of March 21, 1918 [Public — No. 107 — 65th Congress (S. 3752)].

[23] See Espionage Act of June 15, 1917 [Public — No. 24 — 65th Congress (H. R. 291)].

[24] See Trading with the Enemy Act of October 6, 1917, § 11 [Public — No. 91 — 65th Congress (H. R. 4960)].

[25] See Selective Service Act of May 18, 1917, 40 STAT. AT L. 76 and amendments thereto [Public — No. 29 — 65th Congress (S. J. Res. 123)].

different agencies, were conferred upon the President and thus united in him as a common head.[26]

Moreover, the commodities or services dealt with by the various agencies were in the main those in which a serious shortage was created by the increased demands due to war conditions, and hence these commodities or services had to be dealt with, in Justice Holmes' phrase, "like short rations in a shipwreck." [27] It thus became the duty of such agencies as the Fuel and Railroad administrations to distribute the supply of coal and railroad cars in such manner as to give priority to those who would use them for essential purposes. A determination by such a body as the Fuel Administration that one who was not coöperating with an important government agency in abiding by the rules laid down by it in an endeavor to build the proper industrial foundation for the Army and Navy program was not entitled to such priority would seem to be a proper use of a discretionary power given for war purposes. Conditions were in general such that a mere refusal of priority with regard to fuel, labor, transportation, and the like was practically equivalent to a complete denial of the use of such commodities or services, and hence the fear of such a denial was quite sufficient to make a manufacturer feel that a refusal by him to comply with a priority certificate issued by the War Industries Board was, from a practical business standpoint, impossible.[28]

If the arguments advanced above under IV are sound, such

[26] Even where the President was not given originally the right to delegate a particular power conferred upon him to any agency he might choose, this could be done by him after the passage of the Overman Act of May 20, 1918 [Public — No. 152 — 65th Congress (S. 3771)], authorizing him to make such redistribution of functions among governmental agencies as he might believe to be conducive to effective war making.

[27] See Dr. Miles Medical Co. *v.* John D. Park & Sons Co., 220 U. S. 373, 412 (1911).

[28] The following quotation from the OFFICIAL BULLETIN of November 2, 1918, page 3, although not relating to priority certificates, shows the manner in which War Industries Board regulations were linked up with the powers given to other agencies. "B. M. Baruch, chairman of the War Industries Board, authorizes the following: Manufacturers are prohibited from making any sales or deliveries [of lumber] except for essential uses. . . .

"Each manufacturer is required to file with the priorities division of the War Industries Board a pledge in writing. . . .

"Any manufacturer failing within 30 days after date to file the pledge above described, or to make application as provided, will thereby relinquish his right to the benefit of preferential treatment with respect to labor, or to assistance in obtaining fuel or to the automatic class rating for equipment, supplies and materials."

deprivation of fuel, labor, transportation, etc., would, so far at least as it rested upon statutory powers, be a defense for non-performance of contracts. For the reasons above stated it is believed that, under the doctrine of the Hulton case, the implied threat of such deprivation should be given the same effect, and that under war conditions it was immaterial that such an implied threat might be made by an administrative agency other than that to which the statutory power had been delegated, provided only that the circumstances were such as to cause a reasonable man to believe that the threat would if necessary have been carried out.

The effect of priority certificates and other regulations and orders of the character under discussion as a defense in actions of contract raises, however, the question, which has already been referred to in connection with the discussion of the Hulton case, *supra*, whether a contractor, in order to plead governmental compulsion as an excuse for failure to perform his contract, must show that the government had the power and apparent intention, in case of disobedience to its requests, not only to put him out of business for the future but to do so with sufficient dispatch actually to prevent performance of the contract in question.

A contractor clearly should not be compelled to gamble on the possibility that the government's action would be slow, but suppose, for example, that he needed nothing from the government but coal and had enough of that on hand to enable him to perform the plaintiff's contract even if by so doing he would have lost his right to obtain coal in the future. No doubt at first sight it may seem extraordinary to speak of a contract being made impossible of performance because of threatened action which would not if taken have prevented performance. Nevertheless, the effect of requiring performance of the contract in such a case would in general have been not only to put the defendant out of business and thus possibly to ruin him, but also to have made it impossible for him to perform his other contracts which might well have had a longer time to run and might have been capable of performance consistently with compliance with the order of the government if he obeyed that order instead of defying it. It is believed that under such circumstances it would have been, from a practical standpoint, impossible to perform the contract; and that such a

case should be held to fall within the general principle of governmental prevention above set forth.[29]

It may, however, be thought that the argument previously developed, as applied to such acts as the issue of priority certificates, must be limited to cases involving contracts entered into prior to the establishment of the priority system. One who, after that system had been put into operation and had become thoroughly familiar to the commercial world, made an absolute contract to make and deliver commodities of a kind on which priority certificates were issued might be said to have deliberately taken the risk of this sort of interference.

It may be doubted, however, if such was the real intention of the parties in the ordinary case. Business men no doubt frequently find it convenient to make sales in an informal manner without the drafting of elaborate contracts, and the absence of an explicit statement that the seller's obligation was subject to governmental interference or priority certificates should not be held to make the contract an absolute guaranty of delivery. As Holmes, J., said in a recent case (8) in which the doctrine of impossibility of performance was given a rather broad scope, "Business contracts should be construed with business sense, as they would naturally be construed by intelligent men of affairs."[30]

In a recent English case a contract to export aluminum made after war had begun and exports were restricted was treated as a contract to make reasonable efforts to obtain an export license.[31] It is true that to export without a license probably was illegal, which would not have been the case with regard to the giving priority to an order on which no priority certificate was issued. Nevertheless, if an agreement to export is not to be treated as a guaranty to obtain an export license,[32] it may fairly be argued that

[29] *Cf.* The Kronprinzessin Cecilie, 244 U. S. 12 (1917), in which the court held that a German ship was excused for failure to deliver a cargo of gold in England by the fact that, since war was imminent, there was grave danger that such a course would have resulted in the capture of the ship and in the detention of the German passengers.

[30] *Ibid.*, 24.

[31] Anglo-Russian Merchant Traders *v.* John Batt & Co. [1917] 2 K. B. 679. See also Allan Wilde Transport Co. *v.* Vacuum Oil Co., Sup. Ct. Unoff. Jan. 13, 1919.

[32] Such a guaranty would not be illegal, although it might have some tendency to cause the use of improper means to obtain such a license. See English case cited in preceding note.

an agreement to produce is not a guaranty that government regulations such as those relating to priority will not make production impossible.

Wherever a court can thus find that a contract is not an absolute guaranty of performance, it is the contention of this article that performance should not be required by the courts of a defendant who had disregarded his contractual obligations because of administrative regulations aimed at the defendant or the class to which he belonged, where the government had the power and the apparent intention to enforce the regulations directly or indirectly in a manner which would either have made performance of the particular contract impossible or have interfered with the defendant's business so drastically as to constitute what could fairly be called administrative coercion.

It is possible that Congress may render the incorporation of such a doctrine in the common law unnecessary under present circumstances by passing an immunity act which will protect persons who have complied with administrative regulations irrespective of the existence of statutory authority for such regulations, and a precedent for so doing exists in the acts passed in 1863 and 1866 with regard to things done during the Civil War, the constitutionality of which acts was upheld by the Supreme Court in *Mitchell* v. *Clark*.[33] No doubt such a statute would simplify the situation and furnish a ready means of doing justice in cases where justice cannot be done by the courts in the present state of the law without straining that law. Nevertheless it is the writer's belief that the courts can, if the facts with regard to the true character and scope of governmental action in war time are properly brought to their attention, deal with the matter of contracts in a manner which will in general protect those who have obeyed administrative regulations during the war period.

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[33] 110 U. S. 633 (1884).